Nos. 77-1002, 77-1003, 77-1004, 77-6026, 77-6035 and 77-6165

In the Supreme Court of the United States

OCTOBER TERM, 1977

SABATO VIGORITO, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES V. NAPOLI, SR., and JAMES NAPOLI, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL DELUCA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ANTHONY DIMATTEO, PETITIONER

v.

UNITED STATES OF AMERICA

BARRIO MASCITTI, PETITIONER

v.

UNITED STATES OF AMERICA

EUGENE SCAFIDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 564 F. 2d 633. The opinion of the district court (Pet. App. C) is not reported.

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[1] "Pet. App." refers to the appendix in No. 77-1002.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1977. A petition for rehearing, with a suggestion for rehearing *en banc,* was denied on December 15, 1977 (Pet. App. B). The petition for a writ of certiorari in No. 77-6026 was filed on January 12, 1978, the petition in No. 77-6035 was filed on January 13, 1978, and the petitions in Nos. 77-1002, 77-1003, and 77-1004 were filed on January 14, 1978. In No. 77-6165, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to February 13, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in executing a valid court order authorizing the seizure of oral communications at a specified location, law enforcement officers are required by statute or the Fourth Amendment to obtain additional explicit judicial approval to enter that location for the purpose of installing and thereafter maintaining the electronic listening device.

2. Whether the district court should have suppressed evidence of intercepted oral communications on the ground that the government failed to comply with the sealing requirements of 18 U.S.C. 2518(8)(a).

3. Whether the district court should have suppressed evidence of intercepted oral communications involving petitioner DiMatteo because he was referred to as "Pasquale Joseph Rossetti" in the electronic surveillance application and that name had not been listed in the Attorney General's authorization for the application.

4. Whether the evidence is sufficient to sustain the conviction of petitioner Scafidi.

5. Whether the district court abused its discretion in denying petitioner Scafidi's motion for a severance.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955.[2] The court of appeals affirmed, one judge dissenting (Pet. App. A).

1. As the court of appeals observed (Pet. App. 3a), "[t]he evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count)." Petitioners Voulo and Scafidi were convicted on the 967 East Second Street Count. The evidence on that count showed that petitioner Voulo participated in the operation of a policy "bank," a place where money and bets were collected, winning numbers were determined, and daily profits were calculated (Tr. 4408-4429).[3] Petitioner Scafidi visited 967 East Second Street on a regular basis while "banking" activities were taking place, strongly suggesting that he was a link between the bank and "controllers," those who collected bets in the field (Tr. 529-530, 1161-1165, 1841-1844, 1871, 1975-1982).

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[2]Petitioner Vigorito was sentenced to six months' imprisonment pursuant to the parole eligibility provisions of 18 U.S.C. 4205(b)(2) and 30 months' probation and was fined $20,000. Petitioner James Napoli, Sr., was sentenced to five years' imprisonment and was fined $20,000. Petitioner James Napoli, Jr., was sentenced to three years' imprisonment pursuant to 18 U.S.C. 4205(b)(2) and was fined $20,000. Petitioner DeLuca was sentenced to six months' imprisonment and 30 months' probation and was fined $10,000. Petitioner Carrara was sentenced to four months' imprisonment and 32 months' probation and was fined $5,000. Petitioners Voulo, Mascitti, and Scafidi were each sentenced to two months' imprisonment and 34 months' probation. Imposition of sentence on petitioner DiMatteo was suspended in favor of three years' probation.

[3]"Tr." refers to the trial transcript. "H. Tr." refers to the transcript of the hearings on petitioners' pre-trial motions.

The other petitioners were convicted on the Hiway Lounge Count.[4] Petitioner James V. Napoli, Sr., was the central figure in this gambling operation, directing the activities of the "runners" (who collected bets from customers), the "controllers" (who accepted the bets from pickup men and transferred them to policy "banks"), the policy "bank" workers (who determined the winning numbers and calculated daily profits), and the "accountants" (who collated the records of daily betting activity from the "banks") (Tr. 5286-5316). Petitioner James Napoli, Jr., also participated in the management of the lottery and acted as a "controller" *(ibid.)*. Petitioner DeLuca worked in the accounting office (Gov't Ex. 273A; Tr. 5485-5487, 5502-5517), petitioners Vigorito and Carrara were "controllers" (Gov't Ex. 275A; Tr. 3936-3944, 5302), and petitioners DiMatteo and Mascitti were "bankers" (Gov't Ex. 273A; Tr. 5463-5464, 5479-5517, 5276-5278). Petitioner Carrara also was involved in making payments to local police for "protection" (Gov't Exs. 100A, 101A, 224A; Tr. 3785-3786, 3988-3990, 4802, 4804-4806, 4825-4835).[5]

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[4]Petitioner Voulo also was charged in the Hiway Lounge Count, but he was acquitted.

[5]Petitioners Voulo, DiMatteo, Mascitti, and Scafidi were found guilty on the Apartment 309 Count, but that count was thereafter dismissed by the district court on the ground that, because co-defendant Rocco Riccardi was acquitted, the jury had not found that five or more persons had been involved in the gambling operation, as required by Section 1955.

Petitioners and their co-defendants were also tried on a conspiracy count, which was dismissed at the close of the government's case on the ground that the evidence showed the existence of at least two conspiracies, instead of the single conspiracy charged.

2. The government's evidence on the Hiway Lounge Count consisted primarily of conversations in the Lounge intercepted pursuant to three court orders. The first order (Joint App. 274-276),[6] issued on April 12, 1973, authorized the interception of oral communications for 15 days, excluding Sundays. The named targets were the Napolis, DeLuca, DiMatteo, and several co-defendants. The second order (Gov't App. 25-27) was issued on May 3, 1973, and authorized continuation of the initial Lounge interception for an additional 15 days, again excluding Sundays. The named targets were the Napolis, DeLuca, Voulo, and several co-defendants. The third order was issued on May 24, 1973; no evidence derived from this interception was introduced at trial.

The eavesdropping orders specifically identified the premises on which the oral interceptions were to occur but contained no explicit authorization for agents to enter the Hiway Lounge either to install or to repair the listening devices. During the night of April 12-13, 1973, F.B.I. agents entered the Lounge with a passkey and installed two listening devices, one at the bar and one in a back room (H. Tr. 89-90). Agents thereafter re-entered the Lounge once while the first order was in effect to move into the back room the device that had initially been placed at the bar (H. Tr. 186).

During the three-day hiatus between the expiration of the first order and the issuance of the second, the government obtained an order (Joint App. 303) authorizing agents to enter the Lounge during the night of May 2-3, 1973, to restore the batteries in the listening devices so

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[6]"Joint App." refers to the joint appendix in the court of appeals. "Supp. App." refers to the supplemental appendix filed in the court of appeals by petitioner DiMatteo. "Gov't App." refers to the government's appendix in the court of appeals.

that interceptions could resume promptly upon issuance of the second order on May 3.[7] During the interceptions conducted pursuant to either the second or third court orders, agents entered the Lounge once more to rejuvenate the batteries in the listening devices (H. Tr. 70-71).[8]

3. Prior to trial, petitioners moved to suppress evidence derived from the Hiway Lounge and the Apartment 309 surveillances on a variety of grounds, including the government's allegedly improper failure to obtain explicit judicial authorizations for the surreptitious entries into the Lounge and the Apartment. In denying the motion, the district court found that petitioner James Napoli, Sr., alone had standing to challenge the Hiway Lounge entries

[7]During the period when no order was in effect the listening devices remained in the Lounge, but no conversations were monitored (H. Tr. 92). The May 2-3 nighttime entry was necessary because the Department of Justice authorization for the second order could not be received in New York until the morning of May 3, and, based upon conversations intercepted pursuant to the first order, agents believed that an important meeting would be held in the Hiway Lounge on the afternoon of May 3. Thus, if the agents were to restore the batteries prior to the meeting, it was necessary for them to do so before the second surveillance order was in effect (Gov't App. 71-72).

[8]No electronic surveillance was conducted in connection with the 967 East Second Street Count, but much of the government's evidence on the Apartment 309 Count, which was eventually dismissed (*see* note 5, *supra*), was gathered by means of interceptions of oral communications authorized by three court orders, none of which explicitly authorized entry into the apartment.

The orders, each of which authorized the interception of oral communications for 15 days, were obtained on December 8, 1972, January 15, 1973, and February 20, 1973. Using a key furnished by the building superintendent, the agents entered Apartment 309 on the evening of December 8, 1972, and placed two listening devices inside the Apartment (H. Tr. 319-326). The agents re-entered the Apartment once to reposition one of the devices, which had not been productive, and once to remove the devices (H. Tr. 332-333).

by virtue of his status as "sole tenant in possession of the premises" (Pet. App. 28a).[9] On the merits, the court held that the Fourth Amendment did not require the government to obtain a separate entry warrant in addition to an electronic eavesdropping warrant, since "once probable cause is shown to support the issuance of a court order authorizing electronic surveillance[,] thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment" (*id.* at 30a). The court also upheld the agents' May 2-3 nighttime entry to replace the batteries, concluding that the entry had been conducted pursuant to a warrant issued on probable cause and that the additional statutory requirements for electronic surveillance were inapplicable because no such surveillance had been authorized or conducted.

The court of appeals affirmed. Judge Moore, writing for the court, found it unnecessary to decide the question of standing, inasmuch as "whether standing is accorded in this appeal to only one or any number of the [petitioners] will not affect our holding that the [surveillance orders] and the agents' activities were entirely proper" (Pet. App. 8a). The court then rejected petitioners' challenge to the constitutionality of the surveillance-related surreptitious entries (*id.* at 10a-11a):

> There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual

[9]With respect to the surveillance of Apartment 309, the court held that petitioners Mascitti and DiMatteo, the only petitioners whose conversations had been overheard at the Apartment, lacked standing to challenge the surveillance-related entries (Pet. App. 27a).

basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

* * * * *

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

Judge Gurfein concurred. He observed that Congress was aware that successful electronic eavesdropping "would require covert installation" but that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, nevertheless required not a "specification by the judge of the method for placing the 'bug' but simply 'a particular description of the place where the communication is to be intercepted' " (Pet.

App. 18a). Judge Gurfein also agreed with the court that "[t]he orders here do conform precisely to the requirements of the Fourth Amendment * * *" (*id.* at 19a-20a; emphasis in original):

> They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authorization is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.
>
> Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met.

Judge Smith dissented. In his view, "a magistrate [must] pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed to be unoccupied" (Pet. App. 21a-22a).

ARGUMENT

1. The court of appeals concluded that a court order authorizing the electronic interception of oral conversations at specifically designated private premises, in accord with the requirements of 18 U.S.C. 2518, impliedly includes judicial approval for the government surreptitiously to enter those premises "as may be necessary to effect the 'seizure' of the conversations" (Pet. App. 10a). This decision is fully consistent with the congressional intent in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as well as with the dictates of the Fourth Amendment. We recognize, however, that two other circuits have announced divergent views on this issue, which involves an interesting and unresolved aspect of search and seizure law, and that the Court accordingly may wish eventually to consider the issue. We believe nonetheless that further review of this case should be denied: none of the petitioners (with the exception of petitioner Napoli, Sr., on the Hiway Lounge Count) has standing to challenge the covert entries onto premises they neither owned nor occupied; there is no true conflict among the courts of appeals on the issue decided below; and the federal government has adopted a policy of seeking express judicial approval prior to undertaking any entry to plant a court-authorized electronic listening device.

a. There is, to begin with, nothing to petitioners' contention that Title III does not empower courts to authorize covert entries, on probable cause, for the purpose of installing electronic surveillance equipment or that the statute requires such authorization to be explicit in the interception order. Title III is specifically directed at the interception of both "oral" and "wire" communications (18 U.S.C. 2518(1)). In enacting this statute, Congress unquestionably was aware that, while the

interception of wire communications is typically accomplished by means of an outside connection with a telephone line (see *Berger* v. *New York*, 388 U.S. 41, 46), electronic eavesdropping has traditionally required the secret placement of a transmitting device (commonly known as a "bug") inside the area where the conversations are expected to occur (*id.* at 47). See S. Rep. No. 1097, 90th Cong., 2d Sess. 67-68, 102-103 (1968); 114 Cong. Rec. 11598, 12989, 14709-14710, 14732-14734 (1968). See also *United States* v. *United States District Court*, 407 U.S. 297, 307; *Silverman* v. *United States*, 365 U.S. 505, 510; *Lopez* v. *United States*, 373 U.S. 427, 467 n. 15 (Brennan, J., dissenting). Indeed, many of the electronic eavesdropping provisions of Title III were drafted in direct response to this Court's decision in *Berger* v. *New York*, *supra*, which involved a secret entry onto business premises for the purpose of planting a "bug" (388 U.S. at 45). See *United States* v. *United States District Court*, *supra*, 407 U.S. at 302. Yet nowhere in these detailed provisions is there any requirement that the entries essential for the installation and maintenance of listening devices be explicitly authorized by court order.

This silence can hardly be attributed to a studied legislative determination to bar the use of such listening devices. As noted above, both the language and the legislative history of Title III plainly indicate that Congress acted with the purpose of providing authorization, subject to significant safeguards, for both wire interceptions and electronic eavesdropping, and the statute expressly requires that the interception application and order contain a "full and complete statement * * * including * * * a particular description of the nature and location of the facilities from which *or the place where* the communication is to be intercepted * * *." 18 U.S.C. 2518(1)(b)(ii); see also 18 U.S.C. 2518(4)(b) (emphasis

added).[10] Thus, the absence of a specific provision in Title III governing entries to install or maintain listening devices reflects the reasonable assumption that the successful interception of oral communications under the statute would necessarily entail a surreptitious entry and that, at least in the absence of any contrary provision in the surveillance order, judicial authorization for such entries would be implicit in any court order approving the use of electronic eavesdropping.[11]

Here, for example, the judges who approved the electronic surveillance at Apartment 309 and the Hiway Lounge obviously anticipated the need for surreptitious entries to plant the listening devices. The orders authorized the interception of "oral communications," which, as indicated above, virtually without exception requires the placement of a "bug" on the premises. Nothing in the applications for the orders suggested that the government had infiltrated petitioners' gambling operations and intended to have informants install the devices. To the contrary, as the court of appeals found (Pet. App. 10a), the information presented in the applications and

[10]See also 18 U.S.C. 2518(4), which authorizes a court to direct private citizens, including a "*landlord,* custodian or other person," to "furnish [law enforcement authorities] all information, facilities, and technical assistance necessary to *accomplish the interception unobtrusively*" (emphasis added).

[11]Although the American Bar Association also has recognized that surreptitious entry must accompany the installation of most bugging devices (ABA Standards for Criminal Justice, *Electronic Surveillance,* General Commentary, pp. 45, 65 n. 175, 91-92; Commentary on Specific Standards, pp. 139-140, 149; Appendix D, p. 209 (Approved Draft, 1971)), it too has not adopted a specific surreptitious entry provision in either the Tentative Draft of 1968 or the Approved Draft of 1971. Compare §§ 5.7-5.8, p. 8 in the Standards of the Tentative Draft with §§ 5.7-5.8, pp. 18-19 of the Proposed Final Draft of Standards.

supporting affidavits can only be read as notifying the issuing judges that the government planned to undertake secret entries into the Lounge. "It would be highly naive," the court observed, "to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation" (*id.* at 11a). See *Application of United States,* 563 F. 2d 637, 643 (C.A. 4). Moreover, despite the district court's awareness of the necessity for covert entries, the surveillance orders contained no provisions prohibiting or limiting that conduct.[12]

b. Nor, in light of this judicial authorization, were the entries to install and maintain the listening devices in this case in violation of the Fourth Amendment.[13] Entries into unoccupied premises to undertake an otherwise permissible search are of course constitutional (see *Payne* v. *United States*, 508 F. 2d 1391, 1393-1394 (C.A. 5), certiorari denied, 423 U.S. 933; *United States* v. *Gervato*,

[12]Both issuing judges received actual notice of the entries. Special Attorney Fred Barlow testified (H. Tr. 498-500; Joint App. 227-229), and the district court found (Joint App. 132-133), that Barlow had orally informed Judge Bartels of the government's intention to enter the Hiway Lounge surreptitiously. If Judge Bartels had not intended to authorize such an entry, he surely would not have issued the order. Judge Judd was told that "[i]nstallation of monitoring equipment for Apartment 309 occurred at 8:05 p.m. on December 3, 1972." That information was relayed to him in an interception progress report filed by Special Attorney Barlow dated December 18, 1972 (Supp. App. 3a-4a). If Judge Judd believed that the agents had abused the authority conferred by his order when they installed monitoring equipment at Apartment 309, he presumably would have revoked the order and commanded that the interceptions cease. He did not take such action, and the interceptions continued at Apartment 309 until the order expired on December 25, 1972.

[13]The entries, it should be noted, did not result in the seizure of any evidence other than the conversations intercepted pursuant to the court-authorized electronic surveillance (Pet. App. 12a).

474 F. 2d 40 (C.A. 3), certiorari denied, 414 U.S. 864), and the entries here were integral components of a concededly valid electronic surveillance, which had been authorized in advance by a neutral magistrate. Each entry took place pursuant to a court order that was issued upon a strong showing of probable cause and that "particularly describ[ed] the place to be searched, and the persons or things to be seized," thereby satisfying the Amendment's central goal of interposing "a magistrate between the citizen and the police." *McDonald* v. *United States*, 335 U.S. 451, 455. See also *Osborn* v. *United States*, 385 U.S. 323, 330.[14] There is no reason why the judge, in approving the search and seizure of petitioners' conversations, was obliged explicitly to authorize an entry into the premises where the conversations were to occur, when such entry was understood by everyone as essential to the execution of the surveillance order.

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[14]In any event, as the district court found (Pet. App. 27a-28a), petitioner James Napoli, Sr., alone has standing to challenge the admission of the conversations intercepted from the Hiway Lounge, and none of the petitioners has standing to challenge the admission of the conversations intercepted from Apartment 309. If the conversations introduced at trial were illegally obtained, the illegality related not to the seizure of the conversations themselves, which was judicially authorized in full conformity with Title III and the Fourth Amendment, but to the surreptitious entries to plant the listening devices. There is no evidence that any of the petitioners was present when the entries at either location occurred, and the district court properly concluded that the evidence was insufficient to show that any of the petitioners, with the exception of petitioner Napoli, Sr., had a possessory or proprietary interest in either the Lounge or the Apartment sufficient to allow them to contest intrusions made in their absence. See *Brown* v. *United States*, 411 U.S. 223, 229. No petitioner, other than petitioner Napoli, Sr., with respect to the Hiway Lounge, had any expectation of privacy in either location

c. As petitioners note, two courts of appeals, faced with issues similar to those presented in this case, have expressed views at variance with the decision of the Second Circuit. In *United States* v. *Ford*, 553 F. 2d 146 (C.A. D.C.), a court order authorizing the interception of oral communications at a shoe store that served as the center of a narcotics distribution operation expressly permitted the government "to *enter and reenter*" the store "for the purpose of installing, maintaining and removing the electronic eavesdropping devices" and to accomplish the entry "*in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem*" (*id.* at 149-150; emphasis in original). Police officers, posing as members of a bomb squad responding to a bomb scare, entered the store and planted three listening devices. The devices did not function properly, however, requiring the police to re-enter the store, again through a bomb scare ruse, to correct the malfunction. The second entry was not explicitly authorized by a fresh court order, although the judge who had issued the eavesdropping warrant was informally advised of the re-entry in advance and voiced no objection to it.

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when he was not present. See *United States* v. *Galante*, 547 F. 2d 733, 739-740 and n. 11 (C.A. 2), certiorari denied, 431 U.S. 969; *United States* v. *Lisk*, 522 F. 2d 228, 230-231 (C.A. 7), certiorari denied, 423 U.S. 1078.

The court of appeals did not reach the standing issue, explaining that "whether standing is accorded in this appeal to only one or any number of the [petitioners] will not affect our holding that the Orders and the agents' activities were entirely proper" (Pet. App. 8a). This Court also need not consider the matter, cf. *Combs* v. *United States*, 408 U.S. 224, 227 n. 4, unless it is otherwise disposed to grant review on this issue. In that event, it should grant only No. 77-1003, filed by petitioner Napoli, Sr., and should deny the other petitions.

The District of Columbia Circuit affirmed an order suppressing the evidence gathered in the course of the ensuing electronic surveillance. The court accepted "the premise that entries to plant 'bugs' are themselves invasions of privacy distinct from the actual eavesdrop, and therefore require separate consideration in the warrant procedure" and concluded that, "given the showing to the District Judge in this case, the failure of the order to limit time, manner, or number of entries over a 40-day period made the authorization far too sweeping" (553 F. 2d at 170; footnotes omitted).

Although the court of appeals suggested that entries to install listening devices must be authorized by a "warrant narrowly tailored to the demonstrated demands of the situation" (553 F. 2d at 170), thus arguably imposing stringent specificity requirements with respect to such entries that go far beyond the demands of the Warrant Clause in regard to other types of searches and seizures, the holding in *Ford* may be viewed as quite limited in light of the fact that the second entry into the shoe store never received formal judicial authorization except to the extent that authorization might be found in the broad entry provision contained in the original surveillance order. Indeed, the court explained its decision as holding "only that the warrant in this case was defective for expressly authorizing any number and manner of entries when there had been no showing of necessity for such broad authorization" (*ibid.*).

While *Ford* can thus be read as covering narrow ground, there can be no doubt that, to the extent that the court of appeals indicated that some form of explicit judicial authorization is required for each entry to place a listening device, including the initial one, the opinion in *Ford* is inconsistent with the decision below. The same may be said for *Application of United States*, 563 F. 2d

637 (C.A. 4). There, the court, in reversing an order denying the government's application for authorization to install listening devices by means of surreptitious entries, rejected the notion that "once the district court found the interception of the conversations to be allowable under Title III, the decision to secretly enter the premises became a subsidiary tactical matter committed solely to the judgment of the executing officers" (*id.* at 642). Rather, the court stated that "[p]ermission to surreptitiously enter private premises cannot * * * be implied from a valid Title III order sanctioning only the interception of oral communications" (*id.* at 644).[15]

Despite this apparent conflict among the circuits, there is no necessity for this Court to grant review, especially at the behest of petitioners who lack standing to challenge the law enforcement agents' conduct. See note 14, *supra*. Only three courts of appeals have thus far been confronted with the issue decided by the Second Circuit, and *Ford* and *Application of United States* each involved distinguishable factual situations. In *Ford*, not only had the initial entry to plant the listening device been expressly authorized by the surveillance order, but also it had not led to the discovery of any evidence. Hence, the

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[15]See also *United States* v. *Agrusa*, 541 F. 2d 690 (C.A. 8), certiorari denied, 429 U.S. 1045, where the government obtained an order authorizing secret entry into the defendant's place of business to install a court-authorized eavesdropping device. The court held (*id.* at 701) that "law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III." It reserved comment on "what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept)" (*id.* at 696 n. 13).

District of Columbia Circuit had no need to consider the difficult issue resolved by the court below, *i.e.*, whether a warrant authorizing electronic eavesdropping in a particular location implicitly sanctions a surreptitious entry into that area to place the "bug."

Application of United States, on the other hand, arose prior to any interceptions and involved the validity of the district court's insistence that the government establish a "paramount" or "compelling" interest to justify judicial authorization of the surreptitious entry needed to install a listening device before it would issue a Title III eavesdropping order. Since the government had in fact sought a separate entry provision in the surveillance warrant, the Fourth Circuit's discussion of the necessity for such a provision is dictum, albeit perhaps a considered one.[16]

There is an additional reason why the Court need not consider this issue at the present time. Since the decision in *Ford,* the Department of Justice has instructed attorneys supervising the interception of oral communications to seek explicit judicial approval for each surveillance-related entry.[17] Electronic surveillance

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[16]Indeed, the district court's unwillingness to grant an electronic surveillance order unless the government were able to justify a covert entry in that particular case suggests the correctness of the Second Circuit's conclusion that a court's issuance of an eavesdropping warrant without requiring such a showing or imposing any conditions on the method of placing the "bug" implicitly contemplates and sanctions a surreptitious entry.

[17]The following language is presently included in Departmental authorizations of applications for interceptions of oral communications:

> The application should include a request that the order providing for the interception specifically authorize surreptitious entry for the purpose of installing and removing any electronic

authorizations must be approved personally by the Attorney General or his designated Assistant Attorney General, and approval will be withheld from any application not requesting a specific entry authorization, so there is substantial assurance that this policy will be scrupulously followed. In these circumstances, the lawfulness of surreptitious entries without judicial authorization other than as implied in the surveillance order is unlikely to be a recurring issue.[18]

2. Petitioners Vigorito (Pet. 11-16) and DiMatteo (Pet. 33-38) contend that evidence derived from the electronic surveillance at the Hiway Lounge and Apartment 309 should have been suppressed on the ground that the tape recordings of the intercepted conversations were not sealed "[i]mmediately upon the expiration of the period of the order[s], or extensions thereof," as required by 18 U.S.C. 2518(8)(a). This claim is without foundation.

The tape recordings of the conversations intercepted pursuant to the first order authorizing surveillance at the Hiway Lounge were sealed on May 3, 1973, three days after the expiration of the initial order on April 30 and during the period of surveillance authorized by the second Hiway Lounge order. The recordings obtained as a result of the second Hiway Lounge interception order were sealed on May 24, 1973, three days after expiration of that order and during the period of surveillance authorized by the third Hiway Lounge order.[19] The tape

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> interception devices to be utilized in accomplishing the oral interception. Further, an order should be obtained for each additional entry to replace or maintain any oral interception devices.

[18]It is largely for this reason that the government determined not to seek further review in *Ford.*

[19]As previously noted, no evidence derived from conversations intercepted during the period of the third Hiway Lounge order was used at trial.

recordings from the first Apartment 309 surveillance order were sealed on January 16, 1973, 22 days after the period of the order had expired and during the period of surveillance authorized by the second Apartment 309 order. The tape recordings produced pursuant to the second Apartment 309 order were sealed on February 5, 1973, four days after the expiration of that order and during the period of surveillance authorized by the third Apartment 309 order. The last set of tapes was sealed on March 16, 1973, seven days after expiration of the third and final order authorizing surveillance at Apartment 309 (Joint App. 116).

The district court (Joint App. 119-121) and the court of appeals (Pet. App. 13a) correctly found that the second and third Hiway Lounge orders and the second and third Apartment 309 orders were extensions of the original electronic surveillance authorization at each location. As the district court observed (Joint App. 120), "[t]he applications are replete with language evincing an attempt to secure authorization for continued interceptions; reference is made to crimes the subjects 'are continuing to commit' and further conversations they sought to intercept by 'continued surveillance.' More important is the fact that the orders sought were not to include new subjects, and the affidavit recited in detail the conversations seized under each previous order."

Since the second and third Hiway Lounge orders were but extensions of the first, 18 U.S.C. 2518(8)(a) did not require sealing of any of the Hiway Lounge tapes until the period of the third order had expired. That requirement was satisfied. The same conclusion follows with respect to the tape recordings produced pursuant to the first and second Apartment 309 surveillance orders, since those tapes were sealed during the pendency of the third order. Hence, the only sealing hiatus was the seven-day delay in

sealing the tape recordings for the third Apartment 309 order. In view of the absence of any evidence of bad faith on the part of the surveilling agents and the fact that prior to sealing the tapes had been kept in marked boxes in a locked filing cabinet to which only one agent had the key (H. Tr. 100-104, 113-114, 120), the court of appeals rightly concluded (Pet. App. 14a) that this short delay had been satisfactorily explained by the government and was "fully in accord with the" statutory objective of preserving the integrity of the intercepted conversations.[20] Suppression of the evidence derived from the surveillance therefore would not have been warranted.[21]

3. Petitioner DiMatteo contends (Pet. 39-41) that the reference to him as "Pasquale Joseph Rossetti" in the application for the first Apartment 309 surveillance order

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[20]The courts of appeals are in agreement that reasonable delays in sealing, attributable to use of the tape recordings in connection with preparations for trial or with continued investigation, do not require suppression, particularly where there is evidence that the tapes were kept securely. See *United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7), certiorari denied, No. 77-938, March 20, 1978; *United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855; *United States* v. *Sklaroff*, 506 F. 2d 837 (C.A. 5), certiorari denied, 423 U.S. 874. See also *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

The court of appeals properly distinguished its own decision in *United States* v. *Gigante*, 538 F. 2d 502 (C.A. 2). There the delays in sealing ranged from eight months to more than a year, the government offered "no explanation whatsoever" for the delays (*id.* at 504) and "haphazard procedures" were followed in handling the tapes (*id.* at 505).

[21]We note, in addition, that this issue is not likely to be of continuing importance. As we informed the Court in our brief in opposition in *Falcone* v. *United States*, Nos. 74-5500 and 74-5619, in February 1975, long after the surveillances involved in this case, the Department of Justice instituted procedures to remind officials responsible for electronic surveillance of their obligation to present tapes promptly for sealing.

rendered that order invalid, since that name had not been included in the Attorney General's authorization for the application (Supp. App. 1a, 2a). But 18 U.S.C. 2516(1), which requires the Attorney General or a designated Assistant Attorney General to approve every application for a Title III surveillance order, contains no naming requirement. Moreover, the Attorney General's authorization in this case did not purport to limit the persons whose communications were sought to be intercepted to the few names mentioned; to the contrary, it expressly referred to the investigation into violations of 18 U.S.C. 1955 by certain named suspects and by "others as yet unknown." Accordingly, the authorization was broad enough to permit the inclusion of the name "Rossetti" (the person who petitioner DiMatteo was believed to be at the time) in the application.

4. Petitioner Scafidi claims (Pet. 15-23) that the evidence is insufficient to support his conviction on the 967 East Second Street Count, but the court of appeals properly found this argument to be insubstantial (Pet. App. 15a). Petitioner Scafidi was observed entering and leaving the 967 East Second Street residence numerous times in April 1972, usually late in the evening when petitioner Voulo and co-conspirators Joseph Mustacchio and "Buddy" Griffin were there (Tr. 529-530, 1161-1164, 1841-1844, 1871, 1975-1982).[22] On May 1, 1972, when F.B.I. agents arrived at the residence to conduct a search,

[22]Petitioner Scafidi's assertion that his visits to the residence were wholly innocent is belied by the evidence of his prior and subsequent involvement in lottery activities. During a June 1971 search of the premises at 405 Elders Lane in Brooklyn, police officers found petitioners Scafidi and Voulo standing by a table holding betting slips, lottery records, and more than $2,000 in cash (Tr. 4410-4413). In January and February 1973, a number of petitioner Scafidi's gambling-related telephone conversations were intercepted on his home telephone (Pet. App. 15a).

they found petitioner Voulo, Mustacchio and Griffin in a basement room operating what appeared to be a policy "bank." While the search was in progress, petitioner Scafidi arrived on the scene (Tr. 534). The frequency and regularity of petitioner Scafidi's visits was strong evidence from which the jury could have concluded that he participated in the lottery business as a link between the policy "bank" and the "controllers" in the field and that he therefore "advanced" gambling activity in violation of New York law. See N.Y. Penal Law § 225.05 (McKinney 1976).

5. Petitioner Scafidi contends (Pet. 25-27) that he should have been tried separately from his co-defendants. The determination whether to grant a severance of defendants properly joined is committed to the sound judgment of the district court, whose decision may be disturbed on appeal only for clear abuse of that discretion. *Schaffer* v. *United States*, 362 U.S. 511. Petitioner Scafidi has failed to make a persuasive showing that the trial judge abused his discretion in denying him a separate trial.

Petitioner was not, as he suggests, a peripheral participant in a few of the illegal activities charged. He was a defendant in three of the four counts,[23] and, as indicated above, his participation in illegal gambling activities was substantial and continuing. Furthermore, the bulk of the government's evidence was clearly connected to one of the three discrete substantive counts,

[23]Although the conspiracy count tying the three substantive counts together was dismissed by the district court because there was insufficient evidence of a single conspiracy (see note 5, *supra*), the court of appeals found that "the conspiracy count was not frivolous" and that "[t]here is no evidence here of bad faith on the part of the Government * * *" (Pet. App. 16a).

and there is no reason to believe that the jurors were unable to separate the evidence in their minds. Indeed, as the court of appeals observed, "[t]he trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants" (Pet. App. 16a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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